

BEFORE THE  
ATTORNEY GENERAL OF CALIFORNIA  
STATE OF CALIFORNIA

In the Matter of the First Amended Order to  
Cease and Desist and Assessment of Penalties  
Against:

CATHOLIC MEDICAL MISSION BOARD,  
INC.,

Respondent.

Case No. 2018-13-5602319

OAH No. 2018050397

**DECISION**

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Justice as its Decision in the above-entitled matter.

This Decision shall become effective on September 6, 2019.

IT IS SO ORDERED this 6th day of September, 2019.

By: \_\_\_\_\_



Jonathan L. Wolff  
Chief Assistant Attorney General  
Division of Civil Law



OFFICE OF ADMINISTRATIVE HEARINGS

State of California

GENERAL JURISDICTION DIVISION  
320 West Fourth Street, Suite 630, Los Angeles CA 90013  
(213) 576-7200 phone  
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Department of General Services

Governor Gavin Newsom

May 24, 2019

Department of Justice - Charitable Trusts Section  
Registry of Charitable Trusts  
1300 I Street  
Sacramento, CA 95814  
Attn: Executive Director

**RECEIVED**  
Attorney General's Office  
MAY 29 2019  
Registry of  
Charitable Trusts

**Subject:** Catholic Medical Mission Board, Inc.  
OAH No. 2018050397  
Agency No. 2018-13-5602319

Enclosed are the following:

- ☒ The original Proposed Decision
- ☒ An agency order of adoption. If the Proposed Decision is adopted, please return a copy of the signed adoption order to the Office of Administrative Hearings.
- ☐ The original Decision
- ☒ Exhibits numbered: *To Follow*  
Please make sure you have received all listed exhibits. If exhibits are missing, please contact OAH immediately.
- ☐ Email copy of the Proposed Decision to:
- ☐ The above referenced case was resolved prior to conclusion of the hearing. We are returning the enclosed original exhibits 1 – x to you.

ref  
Encl.  
Transmittal Form  
OAH 60 (Rev. 04/09)

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**DECISION**

The attached Proposed Decision of the Administrative Law Judge is hereby adopted  
by the Department of Justice - Charitable Trusts Section as its Decision in the above-entitled  
matter.

This Decision shall become effective on \_\_\_\_\_.

IT IS SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_.

By: \_\_\_\_\_

BEFORE THE  
ATTORNEY GENERAL OF CALIFORNIA  
STATE OF CALIFORNIA

In the Matter of the First Amended Order to  
Cease and Desist and Assessment of  
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Case No. 2018-13-5602319

OAH No. 2018050397

**PROPOSED DECISION**

Administrative Law Judge Thomas Heller, State of California, Office of Administrative Hearings, heard this matter in Los Angeles, California from November 27 through December 12, 2018. It was consolidated for hearing with cases against two other charities: *In re Food for the Poor, Inc.* (Case No. 2018-CT086331, OAH No. 2018050194), and *In re MAP International* (Case No. 2018-CT103136, OAH No. 2018050401). A separate proposed decision is being issued in each case. (Cal. Code Regs., tit. 1, § 1016, subd. (d).)

Sonia K. Berndt, and Jami L. Cantore, Deputy Attorneys General, represented complainant David Eller, Registrar of the Registry of Charitable Trusts. Sandra Barrientos, Deputy Attorney General, also represented complainant on December 7, 2018, and during post-hearing oral argument.

Paul D. Murphy, Esq., and Daniel N. Csillag, Esq., Murphy Rosen LLP, represented respondent Catholic Medical Mission Board, Inc. (CMMB).

At the end of the hearing, the administrative law judge held the record open for the parties to submit closing briefs. Complainant filed a brief on January 11, 2019; CMMB, Food for the Poor, Inc. (FFP), and MAP International, Inc. (MAP) filed briefs on February 11, 2019; and complainant filed a reply brief on February 25, 2019. The briefs were marked for identification as exhibits 1058 through 1062. CMMB also lodged the transcripts of the hearing.

On February 28, 2019, CMMB lodged an exhibit used at the hearing to which complainant objected. On March 8, 2019, the administrative law judge ordered the exhibit

marked but not admitted and deemed the matters submitted. On April 3, 2019, the record was reopened for oral argument, which was held on April 24, 2019, after which the matters were deemed resubmitted.

## SUMMARY

CMMB is a charity that provides donated pharmaceuticals to indigent populations in developing countries, among other charitable programs. To help fund its operations, CMMB solicits monetary donations from persons in California and elsewhere. Complainant alleges CMMB inflated the value of the pharmaceuticals in its financial reporting to make it appear to the public that CMMB was a larger and more efficient charity than it actually was. CMMB used United States market prices to value the pharmaceuticals, and complainant alleges that doing so was inconsistent with generally accepted accounting principles (GAAP), which charities that solicit donations in California must follow. Complainant also alleges CMMB's solicitations for monetary donations were deceptive about how efficient CMMB was in using monetary donations for charitable purposes. CMMB asserts it properly valued the pharmaceuticals and that its solicitations were not deceptive.

Complainant did not prove that CMMB's use of United States market prices to value the pharmaceuticals departed from GAAP. The evidence that the valuations complied with GAAP had more convincing force than the evidence opposed to it. But complainant did prove that CMMB's solicitations for monetary donations were deceptive in implying that CMMB used 97 or 98 percent of all money donated for charitable programs, which it did not. CMMB really used less than 80 percent of monetary donations for charitable programs, and used the rest for administration and fundraising. A cease and desist order and penalties are warranted to address the deceptive solicitations.

## FACTUAL FINDINGS

### *Statement of Facts and Procedural History*

1. CMMB is a nonprofit charitable corporation based in New York. Its stated charitable purposes include delivering quality healthcare services and medicines to people in need throughout the world, and building sustainable healthcare programs that target leading causes of illness, suffering, and death. CMMB solicits monetary donations in California in support of its charitable efforts, but is exempt from California's charity registration and reporting requirements as a religious organization. (Gov. Code, § 12583.)<sup>1</sup> Nonetheless, CMMB is subject to other provisions of the Supervision of Trustees and Fundraisers for Charitable Purposes Act (§ 12580 et seq.), and must maintain its financial records in accordance with GAAP (Bus. & Prof. Code, § 17510.5, subd. (a)). GAAP refers to the set of accounting principles established by the Financial Accounting Standards Board (FASB) in

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<sup>1</sup> Undesignated statutory references are to the Government Code.

order to ensure that financial reporting is transparent and consistent from one organization to another.

2. CMMB receives pharmaceutical donations from United States pharmaceutical companies and then partners with other charities to deliver them to developing countries. During the time period relevant to this case, a typical donation transaction occurred as follows:

- a. A pharmaceutical company offered CMMB a donation of a large quantity of pharmaceuticals, often close to the expiration date of the pharmaceuticals;
- b. CMMB advised a charity partner, such as FFP, of the available pharmaceuticals, quantities, and expiration dates;
- c. The charity partner advised one of its foreign-organization beneficiaries of the available pharmaceuticals, and the foreign organization accepts or rejects the offer;
- d. The charity partner notified CMMB when the foreign organization accepted the offer;
- e. The drugs were shipped from CMMB's warehouse to the selected foreign-organization recipient.

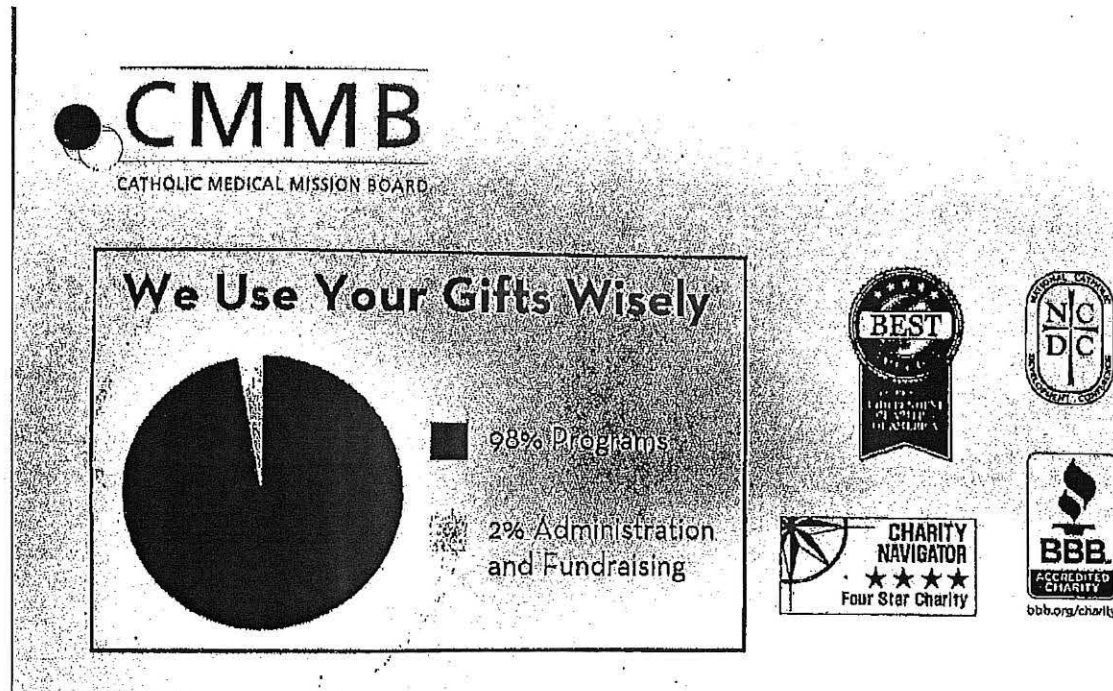
3. For the fiscal years ended September 30, 2012 through September 30, 2015, CMMB reported annual revenue of \$270 million to \$527 million, with donated pharmaceuticals and medical supplies comprising 84 to 94 percent of that revenue. For the same fiscal years, CMMB reported annual program expenses of \$251 million to \$471 million, with pharmaceuticals and medical supplies distributed in other countries comprising 87 to 94 percent of those expenses.

4. The United States pharmaceutical companies have typically restricted the donated pharmaceuticals to distribution and use outside the United States. During the fiscal years described above, CMMB nonetheless used United States market prices to value the donations it received (as revenue), and to value the pharmaceuticals it sent to other countries in partnership with other charities (as program expenses). CMMB then reported those revenue and program expenses on its Internal Revenue Service Forms 990, which CMMB published on its website. CMMB's audited financial statements also included the same revenue and expense figures.

5. CMMB also used those revenue and expense figures in formulating its charitable solicitations for monetary donations. From October 2012 through June 2017, those solicitations typically stated that CMMB used 97 or 98 percent of all gifts to bring healthcare to people in need. These statements were based on CMMB's combined cash (i.e., monetary) and gift-in-kind (GIK) revenues and expenses, with the GIK amounts largely attributable to pharmaceutical donations.



6. CMMB's solicitations stated "We Use Your Gifts Wisely," after which some included a sentence such as, "We are proud that more than 97% of all monetary and in-kind gifts we receive are used to bring life-saving healthcare to people in desperate need." (Exhibits 177-178, 180-181, 185; see also Exhibit 179 [96.3 percent].) Others stated, "CMMB is proud that 98% of our total expenses goes directly to our life-saving programs," or "98% of your donation supports programs for women, children and their communities." (Exhibits 195-196.) Others depicted a pie chart such as the following in lieu of a sentence about the charity's efficiency:



(Exhibit 190, p. NY0000447; see also Exhibits 182-184, 186-188, 191, 193-194, 197.) A CMMB telemarketing script for potential donors from 2013 similarly stated, "I want to reassure you that more than \$0.97 of every dollar we receive goes directly to healthcare so every dollar makes a difference!" (Exhibit 198.)

7. Between October 2012 and June 2017, 16,547 California donors gave a total of \$992,906.95 to CMMB in response to its solicitations. (Exhibit 285.) Of those donors, 6,204 donated in response to one of the CMMB solicitations offered into evidence in the case.

8. In February 2016, Tania Ibanez, the Senior Assistant Attorney General for the Attorney General's Charitable Trusts Section, received a Spanish-language solicitation from FFP with a similar pie chart and statement that more than 95 percent of all donations to FFP go directly to programs that help the poor. The Charitable Trusts Section began investigating FFP, which ultimately led to investigations of CMMB and MAP as well. On March 7, 2018, complainant filed an Order to Cease and Desist against CMMB, which complainant amended

a few days later. The first amended order alleged CMMB improperly used United States market prices to value donated pharmaceuticals even though the donations were restricted to distribution and use outside the United States. According to complainant, the valuations did not comply with GAAP, resulting in overstatements of CMMB's size and efficiency in using donations for charitable programs (as opposed to for administration and fundraising). Complainant also alleged CMMB's solicitations to California donors were deceptive in suggesting that CMMB used 97 or 98 percent of monetary donations for charitable programs, when it actually used a smaller percentage of monetary donations for such programs. Complainant filed similar cease and desist orders against FFP and MAP, which also valued donated pharmaceuticals using United States market prices and made similar percentage efficiency statements in their solicitations.

9. Regarding the solicitations, the first amended order directed CMMB to cease and desist from "including in solicitations to California donors percentages of combined cash and non-cash donations used for programs and/or dollar amounts of pharmaceuticals shipped by CMMB (if dollar amounts were calculated using United States market prices for pharmaceuticals that were restricted for distribution and use overseas). . . ." (Exhibit 1.4, First Amended Order to Cease and Desist against CMMB at p. 8.) The first amended order also sought to prohibit CMMB from "engaging in any solicitation of charitable assets in California due to the fact that CMMB fails to maintain its financial records on the basis of GAAP," and assessed \$409,575 in penalties against CMMB for "making representations in its solicitations to California donors that were false and deceptive, and created a likelihood of confusion or misunderstanding." (*Id.* at pp. 7-9.)

10. CMMB timely appealed the first amended order, and the case was consolidated for hearing with the similar orders against FFP and MAP. The administrative law judge ordered the issue of whether the three charities complied with GAAP to be heard first through the testimony of expert witnesses. Thereafter, the administrative law judge heard evidence on the alleged solicitation violations.

### *GAAP Compliance*

#### COMPLAINANT'S EXPERTS

11. Complainant called two experts in the first phase of the hearing: (1) Joel H. Hay, Ph.D., a pharmaceutical economist; and (2) Craig Stevens, a certified public accountant. Dr. Hay testified about the differences between the United States and international pharmaceutical markets, and opined that the principal markets for the donated pharmaceuticals were international markets, not the United States market, because the pharmaceutical companies restricted the donations to distribution and use outside the United States. According to Dr. Hay, the proper source for valuing the pharmaceuticals was an international pricing guide published by the nonprofit organization Management Sciences for Health. The guide contains a variety of prices from pharmaceutical suppliers, international development organizations and charities, and government agencies, and generally reflects much lower prices than United States market prices, at least for branded drugs. Using the



guide and a calculation formula he developed, Dr. Hay computed much lower prices for the donated pharmaceuticals than the charities reported, and concluded that the charities' use of United States market prices overstated the fair market value of the pharmaceuticals. Dr. Hay is not an accountant or expert on GAAP, but expressed these opinions from the standpoint of an economist.

12. Mr. Stevens testified as an accounting expert in nonprofit audits and GAAP. He retired in 2017 from the accounting firm Aronson, LLC, after leading the firm's nonprofit group and performing over 1,000 audits of nonprofit organizations. Mr. Stevens opined that the charities' use of United States market prices to value the donated pharmaceuticals did not comply with GAAP, because the donations were restricted to distribution and use outside the United States. Therefore, the charities did not maintain their financial records in accordance with GAAP.

13. Under GAAP, an entity must report the "fair value" of an asset or liability, which is "the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date." (FASB Accounting Standards Codification (ASC) 820-10-35-2.) GAAP also requires an entity to use the "principal market" in valuing an asset or liability, or the "most advantageous market" in the absence of a principal market. (FASB ASC 820-10-35-5.) An entity must have access to the principal or most advantageous market in valuing the asset or liability. (FASB ASC 820-10-35-6A.) "In the absence of evidence to the contrary, the market in which the reporting entity normally would enter into a transaction to sell the asset or to transfer the liability is presumed to be the principal market or, in the absence of a principal market, the most advantageous market." (FASB ASC 820-10-35-5A.)

14. Mr. Stevens opined that the United States market was not the principal market for the donated pharmaceuticals because of the donor-imposed restrictions on the distribution and use of the pharmaceuticals. According to Mr. Stevens, the charities lacked access to the United States market because of these restrictions, and the specific countries where the donations were distributed were the principal markets for purposes of valuing the pharmaceuticals under GAAP.

15. On cross-examination, Mr. Stevens acknowledged that the fair value measurement for a donation of pharmaceuticals depends on hypothesizing a sale between market participants, since a donation is not a sale. He also acknowledged that his position was inconsistent with a 2018 audit risk alert to not-for-profit entities from the American Institute of Certified Public Accountants (AICPA), the world's largest member association representing the accounting profession. Although non-binding on GAAP compliance, the risk alert indicated that a donor-imposed restriction to use a pharmaceutical outside the United States does not affect the valuation of the pharmaceutical under GAAP:

GIK use is often subject to donor restrictions and sometimes legal restrictions. An NFP [i.e., not-for-profit] needs to be thorough in understanding which restrictions are

characteristics of the donated assets (and, thus, are restrictions that affect valuation) and which are donor-imposed use restrictions (which are entity restrictions that affect classification of net assets but don't affect measurements of fair value). For example, when pharmaceuticals are from sources in foreign countries (and, thus, unable to be sold in the United States because the pharmaceuticals do not meet US Food and Drug Administration standards), it is a best practice to assume a rebuttable presumption that international market prices should be used to determine fair value. The inability of the pharmaceutical to be sold in the U.S. marketplace is an asset characteristic to be considered in valuing the GIK. However, a donor-imposed restriction to use the pharmaceutical in Africa is a donor-imposed use restriction, which affects the classification of the contribution revenue but not the valuation of the GIK.

(Exhibit 703, pp. 004-005.)

16. Mr. Stevens also admitted his position conflicted with some material in the AICPA's Audit and Accounting Guide, and with the opinions of the auditing firms for CMMB, FFP, and MAP. He also acknowledged that GAAP can potentially have two correct answers in circumstances such as the present case. After discussing these facts, counsel for CMMB asked Mr. Stevens if he remained confident in his opinion, and Mr. Stevens testified he had reservations about his opinion and that his percentage of confidence in it was "dropping."

Q Okay. So sir, based on everything we've talked about, your testimony over the last two days, do you have any reservations about your position, the one that is inconsistent with GAAP -- with the AICPA?

A Do I have any reservations? Yes, sure.

Q One of the reasons you have reservations we talked about earlier; right? GAAP is one of those things that is subjective determinations; right? And it is even possible in circumstances like this to have two correct answers; right?

A Potentially.

Q Okay. After all you've seen, sir, what is your percentage confidence that you are right and everybody on this side is wrong?

A It's dropping.

(Transcript, Vol. V, pp. 929-930.) Complainant did not examine Mr. Stevens on redirect after this testimony.

#### RESPONDENTS' EXPERTS

17. CMMB, FFP, and MAP called three experts: (1) Linda MacDonald, an accounting expert for MAP; (2) Eltjo Schoonveld, a pharmaceutical industry pricing consultant; and (3) Bruce Richman, an accounting expert for all three charities. Ms. MacDonald is a certified public accountant and certified fraud examiner who worked for FASB for about 12 years, and was the lead at FASB for the fair value project that issued the guidance in FASB Statement 157, which is now codified in FASB ASC 820, the GAAP standard for measuring fair value.

18. Ms. MacDonald testified that Mr. Stevens erred in his interpretation of GAAP, and did not apply the definitions of GAAP as they were intended to be applied. She further opined that the donor-imposed restrictions on the use of the pharmaceuticals had no bearing on the determination of the principal market for a fair value measurement under GAAP, and were not the types of restrictions that would otherwise affect the value using the pricing in the principal market for a fair value measurement.

19. In Ms. MacDonald's opinion, the fatal flaw in Mr. Stevens's approach was his initial assumption that there is a transaction to distribute or donate the particular product outside the United States. The correct approach is not to assume the actual use of the product, but rather to value it in the market without regard to whether, how, and where the product will be actually used. According to Ms. MacDonald, Mr. Stevens did the opposite by looking first at how the donations would be used, which resulted in an entity-based measurement, not a market-based measurement as contemplated under GAAP. GAAP does not use entity-based measurements, and required MAP not to consider the actual use of the product in the fair value measurement. The nature of the donation transactions from United States pharmaceutical companies to a United States charity indicated that the principal market was the United States market. Furthermore, the requirement that a reporting entity must have access to the principal market does not change this analysis, because the donor-imposed restrictions on distribution and use of the pharmaceuticals were entity-based restrictions that should not be considered under GAAP.

20. Mr. Schoonveld testified that it was inappropriate for Dr. Hay to use the Management Sciences for Health pricing guide in valuing the donated pharmaceuticals. The guide does not include information from pharmaceutical manufacturers, and the information in it is sparse. According to Mr. Schoonveld, the more appropriate and complete source for pricing is the Wholesale Acquisition Cost (WAC), a United States market-based measurement of pharmaceutical costs. The prices in the Management Sciences for Health guide were much lower than in the private international markets for pharmaceuticals.

21. Bruce Richman, a certified public accountant, is the national director of the business investment global valuation advisory practice of Mazars USA, an accounting and

consulting firm. Like Ms. MacDonald, Mr. Richman opined that the United States market was the principal market for purposes of a GAAP valuation, and testified that the charities' valuations of the donations were correct. Mr. Richman gives significant weight to AICPA interpretations of GAAP, and has never departed from AICPA guidance. He agreed with Ms. MacDonald's opinions with respect to all three charities.

#### DISCUSSION OF GAAP COMPLIANCE

22. The charities' evidence of GAAP compliance had more convincing force than the evidence opposed to it. In particular, the testimony of Ms. MacDonald and Mr. Richman was more persuasive on the GAAP valuation issues than Mr. Stevens's testimony, and supported the charities valuing the pharmaceutical donations according to United States market prices. Ms. MacDonald and Mr. Richman rebutted Mr. Stevens's testimony, and Mr. Stevens questioned his own interpretation of GAAP by the end of his testimony, stating that his confidence in his opinion was "dropping." Furthermore, the AICPA audit risk alert from 2018 is directly on point and supports the charities' position. Although not authoritative on GAAP compliance, the AICPA risk alert is consistent with the testimony of Ms. MacDonald and Mr. Stevens and supported the charities valuing the donated pharmaceuticals as they did, despite the restrictions on the distribution and use of those donations to locations outside the United States. The charities' independently-audited financial statements also supported those valuations and evidenced multiple other accountants certifying the valuations as complying with GAAP. Therefore, the weight of the evidence on GAAP compliance was that the charities complied with GAAP in their valuations of the donated pharmaceuticals.

#### *Solicitations*

#### COMPLAINANT'S WITNESSES

23. Complainant called two witnesses regarding the charities' solicitations: (1) Ms. Ibanez; and (2) Steven Bauman, a Supervising Investigative Auditor in the Attorney General's Charitable Trusts Section. Ms. Ibanez testified that the Charitable Trusts Section assists the Attorney General in his oversight of charities and professional fundraisers, and is the section that investigated and prosecuted this case.

24. Ms. Ibanez testified she was concerned about the solicitation from FFP she received in 2016 because she knew mail solicitations were extremely expensive, which made her doubt the accuracy of the statement in the solicitation that less than five percent of FFP's expenses were administrative expenses. Her concern led to the investigation of FFP, which in turn led to the investigations of CMMB and MAP. Ms. Ibanez noted that only monetary donations can pay for administrative expenses and fundraising, and opined that a typical donor would not realize what percentage of donations are monetary versus GIK. In Ms. Ibanez's opinion, even if the charities followed GAAP, their percentage efficiency statements were misleading because the vast majority of revenue and expenses used in the percentage efficiency calculations were GIK that could not be used to pay for administrative and fundraising expenses.

25. Mr. Bauman has been an auditor in the Charitable Trusts Section for 30 years. He conducted an analysis of the charities' respective Forms 990 for the years at issue and found that 25 percent to 40 percent of the charities' monetary donations were used to pay for administrative, management, and general expenses, rather than for program services. For CMMB in particular, his analysis of the annual Forms 990 indicated that less than 80 percent and in some cases less than 70 percent of CMMB's monetary donations went to program services. (Transcript, Vol. VIII, pp. 1503-1504.) He reached this result by comparing CMMB's reported revenues to its program and other expenses.

#### CMMB'S EVIDENCE

26. CMMB called Bruce Wilkinson, its president, to testify about the solicitations and CMMB's operations and finances. Mr. Wilkinson testified the percentage efficiency statements in the solicitations were accurate and referred to CMMB's efficiency in using all donations, not just monetary donations. CMMB derived the percentages directly from CMMB's IRS Forms 990 and audited financial statements with respect to both in-kind donations (such as donated pharmaceuticals) and monetary gifts. CMMB is proud of those percentages because they inform donors that CMMB is an efficient charity. Furthermore, consumer organizations such as the Better Business Bureau and Charity Navigator report the same efficiency percentages about CMMB by independently analyzing CMMB's IRS Forms 990. Other than in this case, no one has ever complained to CMMB that the percentages were inaccurate.

27. Under questioning from complainant's counsel, Mr. Wilkinson testified that all responses to CMMB's direct mail solicitations are cash (i.e., monetary) donations, and that cash donations pay all of CMMB's fundraising expenses, salaries, and accounting and legal fees. GIK donations do not pay those expenses.

#### DISCUSSION OF SOLICITATION EVIDENCE

28. Mr. Wilkinson's testimony that the percentage efficiency statements in the solicitations were accurate with respect to CMMB's donations as a whole is not determinative on whether the solicitations were deceptive. A statement may be accurate on some level but still be deceptive, e.g., by failing to disclose other relevant information. At the same time, Ms. Ibanez's opinion that the charities' solicitations were deceptive does not prove they were. The Charitable Trusts Section is prosecuting this case, and Ms. Ibanez's personal opinion as the leader of that section is not proof of a violation. Resolution of complainant's allegations concerning the solicitations requires determining whether a deceptive character appears on applying the words of the solicitations to the facts without regard to that opinion.

29. CMMB's solicitations stated "We Use Your Gifts Wisely," with either a sentence or pie chart typically stating or depicting that CMMB was 97 percent or 98 percent efficient in using gifts for charitable programs, rather than for administrative and fundraising costs. These statements implied that 97 percent and 98 percent of the gifts being solicited –



i.e., monetary gifts – would be used for charitable programs, and that only two or three percent would be used for administration or fundraising. But CMMB only used the stated percentages of gifts for charitable programs when considering both monetary and in-kind gifts. When considering just monetary gifts, CMMB used a much lower percentage of gifts for charitable programs. None of the solicitations stated that lower percentage, and thus none of them accurately described CMMB's efficiency in using the monetary gifts being solicited for charitable programs.

30. While some of the solicitations described the percentages with reference to "monetary and in-kind gifts" or "total expenses," the pie charts used in many of the solicitations did not. Moreover, in all of the solicitations, the statement "We Use Your Gifts Wisely" linked the percentage to the monetary gifts requested in CMMB's mailings. This phrasing implied that the stated percentages applied to the monetary gifts being solicited, which they did not. Thus, the solicitations were couched in a manner that was likely to deceive potential donors into believing that CMMB was more efficient in using monetary gifts for charitable programs than it actually was.

## LEGAL CONCLUSIONS

### *Legal Standards*

1. The Attorney General has the primary responsibility for ensuring compliance with charitable fundraising laws and for protecting charitable assets, and "has broad powers under common law and California statutory law to carry out these charitable trust enforcement responsibilities. . . ." (§ 12598, subd. (a).) "Virtually every aspect of the activities of charities and their commercial fundraisers is subject to comprehensive regulation. The assets of nonprofit corporations . . . organized solely for charitable purposes, are impressed with a charitable trust which the Attorney General has a duty to protect. [Citation.]" (*People v. Orange County Charitable Services* (1999) 73 Cal.App.4th 1054, 1074.)

2. The first amended order alleges CMMB violated California law by not maintaining its financial records in accordance with GAAP. For a charitable organization soliciting donations in California, "[t]he financial records of [the] soliciting organization shall be maintained on the basis of generally accepted accounting principles as defined by the American Institute of Certified Public Accountants, the Governmental Accounting Standards Board, or the Financial Accounting Standards Board." (Bus. & Prof. Code, § 17510.5, subd. (a).) The first amended order also alleges CMMB violated California law by making deceptive representations in its charitable solicitations. "Regardless of injury, the following acts and practices are prohibited in the planning, conduct, or execution of any solicitation or charitable sales promotion: [¶] . . . [¶] (2) Using any unfair or deceptive acts or practices or engaging in any fraudulent conduct that creates a likelihood of confusion or misunderstanding." (§ 12599.6, subd. (f)(2).)



3. The Attorney General may issue an administrative cease and desist order upon finding that a charity has engaged in a violation of the Supervision of Trustees and Fundraisers for Charitable Purposes Act or the regulations adopted under it. (§ 12591.1, subd. (b); Cal. Code Regs., tit. 11, § 314, subd. (a)(4).) The Attorney General may also impose an administrative penalty of up to \$1,000 for each act or omission constituting a violation. (§ 12591.1, subd. (c); Cal. Code Regs., tit. 11, §§ 315, 999.6, subd. (a)(3).) The charity may appeal the Attorney General's administrative action, and the hearing on the appeal "shall be conducted in accordance with the procedures set out in Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except for provisions requiring the designation of administrative law judges." (Cal. Code Regs., tit. 11, § 999.6, subd. (e).) At the hearing, complainant bears the burden of proving the alleged violations by a preponderance of the evidence (Evid. Code, § 115), which means "evidence that has more convincing force than that opposed to it." [Citation.] (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

### *Discussion*

#### GAAP COMPLIANCE

4. Complainant did not prove a GAAP violation by a preponderance of the evidence. The testimony of Ms. MacDonald and Mr. Richman about GAAP had more convincing force than Mr. Stevens's testimony, and supported the charities valuing the pharmaceutical donations according to United States market prices. Furthermore, the AICPA audit risk alert from 2018 is directly on point and supports the charities valuing the pharmaceuticals as they did. The charities' independently-audited financial statements also supported the valuations by evidencing that multiple other accountants agreed with those valuations. (Factual Finding 22.)

5. In a case about GAAP and an entity's balance sheet, the United States Court of Appeals for the Ninth Circuit stated, "To determine whether the balance sheet is prepared in accordance with GAAP, we do not take off our judicial black robes and reach for the accountant's green eye shade." (*Bolt v. Merrimack Pharmaceuticals, Inc.* (9th Cir. 2007) 503 F.3d 913, 918.) In a case about GAAP and charity valuations of donated pharmaceuticals, an administrative hearing officer does not get to reach for the accountant's green eye shade either. Admittedly, using United States market prices to value donated pharmaceuticals that are restricted to distribution and use outside the United States is counterintuitive, and leads to annual revenue and expense figures for CMMB in the hundreds of millions of dollars, making the charity seem artificially large. But determining CMMB's compliance with GAAP depends on expert evidence, not on intuition. The charities' expert evidence of GAAP compliance was more persuasive than complainant's expert evidence of non-compliance.

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## SOLICITATIONS

6. Although complainant did not prove a GAAP violation, the evidence did prove that CMMB used “deceptive acts or practices . . . that create[d] a likelihood of confusion or misunderstanding” in its solicitations. (§ 12599.6, subd. (f)(2).) CMMB’s solicitations were likely to deceive potential donors into believing that CMMB was more efficient in using monetary gifts for charitable programs than it actually was. The solicitations for monetary gifts stated that CMMB used 97 or 98 percent (or in one case 96.3 percent) of gifts for charitable programs, and were written in a manner implying that this percentage applied to the monetary gifts being solicited. But CMMB really used less than 80 percent of monetary donations for charitable programs, and used the rest for administration and fundraising. Potential donors were likely to be deceived by the percentage efficiency statements, which did not accurately represent CMMB’s efficiency in using monetary gifts for charitable programs. (See Factual Findings 23-30.)

7. No appellate court has interpreted section 12599.6, but the unfair competition law (UCL), Business and Professions Code section 17200 et seq., contains analogous provisions. The UCL statutes prohibit unfair, deceptive, or unlawful business practices, and section 12599.6 contains similar prohibitions with respect to charitable solicitations. In addition, section 12599.6, subdivision (f)(2), is analogous to the UCL in prohibiting unfair, deceptive, or fraudulent conduct “that creates a likelihood of confusion or misunderstanding.” This is akin to the UCL’s “likely to deceive” criteria, under which even a perfectly true statement may be actionable:

A business practice violates the law if it is “likely to deceive the public.” [Citations.] It may be based on representations to the public which are untrue, and “also those which may be accurate on some level, but will nonetheless tend to mislead or deceive . . . . A perfectly true statement couched in such a manner that is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under” the UCL. [Citations.]

(*Patricia A. Murray Dental Corp. v. Dentsply International, Inc.* (2018) 19 Cal.App.5th 258, 271.) Therefore, cases interpreting the UCL provide useful guidance in interpreting section 12599.6.

8. Even if the percentage efficiency statements in CMMB’s solicitations were technically accurate based on CMMB’s reported financial information, those statements were deceptive because they implied that CMMB used only 2 percent or 3 percent of monetary gifts for administrative and fundraising costs. A reasonable person would be likely to interpret the percentage efficiency statements in the solicitations that way. Under the UCL, a claim based on false or misleading advertising and unfair business practices must be evaluated from the vantage of a reasonable consumer, unless the advertisement targets a particular disadvantaged or vulnerable group. (*Lavie v. Procter & Gamble Co.* (2003) 105

Cal.App.4th 496, 506-509.) Similarly here, CMMB's charitable solicitations must be evaluated from the vantage of a reasonable person, who need not be "exceptionally acute and sophisticated" or "necessarily wary or suspicious" of the solicitations. (See *id.* at pp. 509-510.)

9. CMMB's argument that its percentage efficiency statements are true is not determinative, because even a true statement may be deceptive for the reasons described above. CMMB also argues that because there are no reported complaints about its solicitations, no one has been deceived. But proof of actual deception or injury is not necessary, and donors who are unaware they are being deceived would not complain in any event.

10. CMMB further argues there was insufficient proof of a violation because complainant offered no evidence of the characteristics of a reasonable donor and no evidence that a significant portion of CMMB's donors would be misled. But the primary evidence in this charitable solicitation case is the solicitations themselves, just as "the primary evidence in a false advertising case is the advertisement itself." (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 100 (*Brockey*); accord, *Hypertouch, Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805, 839.) A consumer survey or similar evidence that misstatements would likely deceive a reasonable person is not required. (*Brockey, supra*, 107 Cal. App.4th at p. 100.)

11. Moreover, determining reasonableness is something the trier of fact – in this case, the administrative law judge – does in all types of cases. As indicated in *Brockey*, if "a person of ordinary intelligence could reasonably be deceived or confused, that is all that is required." (*Brockey, supra*, 107 Cal.App.4th at p. 100, quoting *Hair v. McGuire* (1961) 188 Cal.App.2d 348, 353.) The trier of fact should not have to exclude himself or herself as a person of ordinary intelligence and a reasonable person. The solicitations speak for themselves, and the percentage efficiency statements in them implied facts about how CMMB used its monetary donations that were untrue. Therefore, the administrative law judge is in a position to determine that the solicitations were likely to deceive a reasonable person.

#### FIRST AMENDMENT

12. CMMB and the other two charities also argue that the orders against them violate their First Amendment rights to freedom of speech under the United States Constitution. But no appellate court has declared section 12599.6 unconstitutional, and the United States Supreme Court's opinions on charitable solicitation have taken care to leave a corridor open for actions to guard the public against false or misleading charitable solicitations. (*Illinois ex rel. Madigan v. Telemarketing Associates, Inc.* (2003) 538 U.S. 600, 617 (*Madigan*)). This is such an action.

13. The charities liken section 12599.6, subdivision (f)(2), to a statute invalidated in *Riley v. National Federation of the Blind of North Carolina, Inc.* (1988) 487 U.S. 781

(*Riley*), that compelled fundraisers to disclose to potential donors the percentage of the prior year's contributions that actually went to charity. (*Id.* at p. 795.) But section 12599.6, subdivision (f)(2), compels no speech; rather, it prohibits unfair, deceptive, or fraudulent acts or practices in the planning, conduct, or execution of any solicitations or charitable sales promotion. The Supreme Court has never held that the First Amendment protects such acts or practices in charitable solicitations. To the contrary, a state may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements. (*Riley, supra*, 487 U.S. at p. 800.)

14. *Riley, Village of Schaumburg v. Citizens for a Better Environment* (1980) 444 U.S. 620, and *Secretary of State of Md. v. Joseph H. Munson Co., Inc.* (1984) 467 U.S. 947, each invalidated state or local laws that categorically restrained solicitation by charities or professional fundraisers if a high percentage of the funds raised would be used to cover administrative or fundraising costs. (See *Madigan, supra*, 538 U.S. at p. 610.) In contrast, section 12599.6 does not categorically restrain solicitation based on the percentage of funds used to cover administrative or fundraising costs, but rather seeks to protect California consumers from unfair, deceptive, or fraudulent acts or practices in charitable solicitations.

15. Citing *Madigan*, the charities argue that the First Amendment forbids the government from prohibiting false or misleading statements in charitable solicitations in the absence of proving common law fraud. *Madigan* authorized suit by Attorney General of Illinois against professional fundraisers for fraudulent charitable solicitations, holding that the government's "full burden of proof" of common law fraud "provided sufficient breathing room for protected speech." (*Madigan, supra*, 538 U.S. at pp. 615, 623-624.) But this holding does not mean the deceptive statements at issue are protected under the First Amendment, or that proof of common law fraud is required in every government action concerning charitable solicitations to provide the necessary "breathing room" for protected speech. (*Ibid.*)

16. Section 12599.6, subdivision (f)(2), requires that charitable solicitations be conducted without unfair, deceptive, or fraudulent acts or practices that create the likelihood of confusion or misunderstanding. California has a compelling interest in protecting its residents from such acts or practices in charitable solicitations, and section 12599.6 is narrowly drawn to further that interest without interfering unnecessarily with First Amendment freedoms. Therefore, enforcing that statute in this case does not violate the First Amendment.

### *Disposition*

#### CEASE AND DESIST ORDER

17. Complainant requests that the Attorney General affirm the order that CMMB cease and desist from "including in solicitations to California donors percentages of combined cash and non-cash donations used for programs and/or dollar amounts of pharmaceuticals shipped by CMMB (if dollar amounts were calculated using United States



market prices for pharmaceuticals that were restricted for distribution and use overseas). . . .” (Exhibit 1.4, First Amended Order to Cease and Desist against CMMB at p. 8.) Complainant established that including those percentages in solicitations violated section 12599.6, subdivision (f)(2); therefore, a cease and desist order concerning those percentages is proper. The reference to “dollar amounts of pharmaceuticals shipped by CMMB” refers to complainant’s objection to CMMB valuing donated pharmaceuticals according to United States market prices. Since complainant did not prove that CMMB’s valuations violated GAAP, that portion of the requested order will not be imposed.

18. Complainant also requests an order prohibiting CMMB from “engaging in any solicitation of charitable assets in California due to the fact that CMMB fails to maintain its financial records on the basis of GAAP . . . .” (Exhibit 1.4, First Amended Order to Cease and Desist against CMMB at p. 8.) Because complainant did not prove a GAAP violation, this request will be denied.

#### PENALTIES

19. In his closing brief, complainant requests \$100 in penalties per deceptive solicitation under section 12591.1, not to exceed the \$409,575 in penalties assessed for solicitation violations in the first amended order. The record does not reveal how complainant calculated the specific dollar amount in the first amended order.

20. Section 12591.1 is silent regarding the criteria to consider in assessing the amount of the penalty, but the UCL provides useful guidance on the appropriate criteria: “In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant’s misconduct, and the defendant’s assets, liabilities, and net worth.” (Bus. & Prof. Code, § 17206, subd. (b).)

21. Complainant’s request is reasonable and is far less than the \$1,000 per violation authorized by statute. (§12591.1, subd. (c).) Under the UCL, each act of false advertising constitutes a separate violation (*People v. Toomey* (1984) 157 Cal.App.3d 1, 21-23); by analogy, each deceptive solicitation in this case is a separate violation. Between October 2012 and June 2017, 16,547 Californians donated \$992,906.95 to CMMB in response to its solicitations. Of those donors, 6,204 donated in response to one of the CMMB solicitations offered into evidence in the case. (Factual Finding 7.) Even considering just those 6,204 donors, penalties of \$100 per solicitation would far exceed \$409,575, the amount assessed in the first amended order.

22. CMMB’s direct mail solicitations to Californians were deceptive and created a likelihood of confusion or misunderstanding by California donors. The volume, persistence, and length of time during which CMMB sent deceptive solicitations was substantial, as was the income CMMB derived from the solicitations. The solicitations were worded so that

potential donors would believe that only two or three percent of monetary gifts would be used for fundraising and administrative costs, which was not the case. This conveyed a false sense of CMMB's efficiency as a charity. Mr. Wilkinson's testimony that the percentages were accurate when considering all of CMMB's programs does not justify reducing the penalty below \$100 per solicitation. The solicitations were still deceptive. Furthermore, CMMB has substantial annual income and the net worth and assets available to pay the requested penalty amount, according to its own financial records. (See Factual Finding 3.) Therefore, CMMB will be ordered to pay the requested amount.

#### ORDER

The First Amended Order to Cease and Desist is affirmed in the following respects:

1. CMMB shall immediately cease and desist from including in its solicitations to California donors percentages of combined cash and non-cash donations used for programs. This order applies to CMMB, its officers, directors, employees, and all persons or entities acting on its behalf, including commercial fundraisers for charitable purposes soliciting on its behalf.
2. Within 10 days from the effective date of this order, CMMB will provide a copy of this order to:
  - a. Every commercial fundraiser for charitable purposes and fundraising counsel for charitable purposes with which it currently contracts.
  - b. Every officer, director and employee of CMMB.
3. Within 15 days from the effective date of this order, CMMB shall provide written confirmation to the California Attorney General that it is in compliance with this order, including proof of service of the order as required by the preceding paragraph.
4. Within 30 days from the effective date of this order, CMMB shall pay a penalty of \$409,575 to the California Attorney General.

DATED: May 24, 2019

DocuSigned by:  
*Thomas Heller*  
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THOMAS HELLER  
Administrative Law Judge  
Office of Administrative Hearings



**DECLARATION OF SERVICE BY E-MAIL and U.S. Mail**

Case Name: **In the Matter of the First Amended Order to Cease and Desist and Assessment of Penalties Against:**

**CATHOLIC MEDICAL MISSION BOARD, INC.**

Case No.: **2018-13-5602319**

OAH No.: **2018050397**

Case Name: **In the Matter of the First Amended Order to Cease and Desist, Revocation of California Charity Registration and Assessment of Penalties Against:**

**FOOD FOR THE POOR, INC.**

Case No.: **2018-CT086331**

OAH No.: **2018050194**

Case Name: **In the Matter of the First Amended Order to Cease and Desist, Revocation of California Charity Registration and Assessment of Penalties Against:**

**MAP INTERNATIONAL**

Case No.: **2018-CT103136**

OAH No.: **2018050401**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 6, 2019, I served the attached **DECISIONS** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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**(By U.S. Mail only)**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 6, 2019, at San Francisco, California.

Kathleen M. McCormick  
\_\_\_\_\_  
Declarant

  
\_\_\_\_\_  
Signature